Hundt

LOW TECH DESIGNS, INC.™

"BRINGING TECHNOLOGY DOWN TO EARTH"℠

Mr. William Caton
Acting Secretary
Federal Comm. Comm.
1919 M. St., N.W.
Rm. 222
Washington, DC 20554

August 12, 1997

Ex Parte

Dear Mr. Caton,

On the above date, Mr. James M. Tennant, President of Low Tech Designs, Inc. (LTD), participated in a telephone conference call with FCC staff members Mr. William Kehoe and Ms. Katherine Schroder, to discuss LTD's ex parte filings faxed on this day to Mr. Kehoe and Ms. Schroder. These ex parte filings were submitted in CC Dockets 97-163, 97-164, and 97-165.

Mr. Tennant explained his legal reasoning for FCC assumption of his arbitrations that were denied him by the Illinois Commerce Commission, the Georgia Public Service Commission, and the Public Service Commission of South Carolina respectively. Mr. Tennant emphasized the fact that none of the State Commissions were able to refute in their filings LTD's argument that they failed to act on LTD's arbitration issues that were properly filed in LTD's petitions for arbitration. Mr. Tennant also acknowledged that each petition for assumption contained invalid reasoning that the state commissions used to deny LTD an arbitration hearing, but that the root reason for LTD's petitions for assumption was based on a complete failure to act by the state commissions, and not because of any finding of law by the state commissions. Mr. Tennant also emphasized the legal basis for LTD's status - under the Telecommunications Act of 1996, FCC Rules and the recent Eighth Circuit court rulings - as a requesting telecommunications carrier. Because of this irrefutable status as a requesting telecommunications carrier, LTD is entitled to the right to arbitrate before state commissions. Since none of the states carried out an actual arbitration, they have all failed to act under the 1996 Act.

In reply to questions from the Staff, Mr. Tennant also explained the legal basis for LTD's assertion that its proposed least cost routing service for long distance calls qualifies as a telecommunications service. Mr. Tennant pointed to the definition of an information service in the Act, and showed where information service technology could be used for the management or control of a telecommunications system or service without triggering the information service threshold. Mr. Tennant also explained how Centrex automatic route selection, as provided by ILECs, is an almost identical service to LTD's proposed service. Mr. Tennant also pointed to recent rulings of the FCC (FR&O in CC 92-105, Feb. 19, 1997), declaring *XX codes to be telephone numbers (and therefore dialable by all telephone subscribers) and how the provisioning of advanced intelligent network (AIN) services using *XX codes by companies such as LTD would advance the FCC's desire to see AIN be the telephony equivalent of a open IBM PC programming platform. Mr. Tennant also suggested that the FCC rule

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regarding all-AIN-triggers to the unbundled-switching-port-dialtone-provider to be possibly anti-competitive and constituting an illegal antitrust tying arrangement, and pointed to LTD's proposed officewide, pay-per-use, non-presubscribed *XX implementation of AIN services as a way to keep this emerging market open. Mr. Tennant also discussed LTD's opinion that *XX codes are the telephony equivalent of an Internet Web address and should be made available to all telephone subscribers on an ILEC switch. Mr. Tennant also stated that its *11 (Star*11℠) based least cost routing service might want to be blocked by a company such as AT&T on resold lines or rebundled ports, but that the end user would have the ultimate right to have this telephone number be made available for their dialing. Mr. Tennant explained that his proposed least cost routing service would be the first truly widespread consumer-level electronic commerce application, and would be the tip of the iceberg of services that could be offered to telephone consumers.

LTD certifies that it has included Mr. Kehoe and Ms. Schroder in its service of copies of this cover letter and of the ex parte filings, even thought their names do not appear on the service list attached to each ex parte filing.

LTD has included additional copies in this filing for the individual Commissioner and kindly requests that they be distributed to them.

Thank you for your assistance with this matter.

Sincerely,

James M. Tennant

James M. Tennant
President

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EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Petition for Commission Assumption	)	CC Docket 97-165
of Jurisdiction of Low Tech Designs, Inc.'s	)	
Petition for Arbitration with GTE South Before the	)	
Public Service Commission of South Carolina	)	

EX PARTE COMMENTS OF LOW TECH DESIGNS, INC.

Low Tech Designs, Inc. ("LTD") respectfully submits these ex parte comments regarding its petition for Commission assumption of the Public Service Commission of South Carolina ("PSCSC") jurisdiction of arbitration pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 ("the Act").

The PSCSC and GTE South ("GTE") both filed comments in opposition to LTD's petition. Both filings confirm the original claim of LTD in its petition, namely, that the PSCSC failed to fulfill its duty to arbitrate failed negotiations between LTD and GTE.

Neither party put forward evidence that any arbitration decisions were made by the PSCSC to resolve the differences between LTD and GTE documented in LTD's petition for arbitration. Neither party indicated that LTD's petition was defective in timeliness, content, format or in any substantial manner that would justify the dismissal of same. Instead, both parties put forward arguments that the PSCSC was justified in dismissing LTD's petition for arbitration because LTD was not certificated as a new entrant local exchange carrier by the PSCSC. As LTD asserted in its Petition for Assumption, the Telecommunications Act of 1996, applicable FCC Rules and the legislative history of the Act all point towards the validity of LTD's claim to be considered a new entrant requesting telecommunications carrier, legally able to negotiate with incumbent LECs, and therefore, entitled to arbitration under the Act, notwithstanding South Carolina state laws and interpretation of those laws to the contrary.

The drafters of the Act did not anticipate new entrants such as LTD being rebuffed by State Commission in their efforts to enter the marketplace. State Commissions were given the ***responsibility*** to conduct arbitrations to resolve inevitable differences between new entrant requesting telecommunications carriers and incumbent LECs. If they failed in their responsibility, the FCC was given the responsibility to assume their assigned duty.

Dismissing a properly filed petition for arbitration because the petitioning party does not currently hold a certificate of public convenience and necessity from the petitioned State Commission is at odds with the pro-competitive intent of the Act and with 47 C.F.R. 51.301(c)(4)[1], which provides for good faith negotiation between requesting telecommunications carriers and incumbent LECs absent state certification. Interestingly, the PSCSC, in response to LTD's petition for assumption, does not even mention or try to justify the legal basis for the South Carolina law[2] defining a new entrant local exchange carrier as:

> a telecommunication company holding a certificate of public convenience and authority issued pursuant to Section 58-9-280(B) after December 31, 1995, to provide local exchange service within a certificated geographic service area of the State.

Section 253(b) of the Act properly anticipates and provide legal basis for the States to continue to issue certificates of authority for the purposes of providing telecommunications services to the public under tariff. LTD has no argument with this proper use of the certification requirements in South Carolina. However, using Section 253(b) authority as a tool to allow properly filed arbitration requests to be dismissed is not the intent of the Act or of the FCC rules implementing the Act. Until a new entrant requesting telecommunications carrier is able to arbitrate to obtain an interconnection agreement, it is certainly not ready to file for certification in order to be given state legal authority to actually provide the intended telecommunications services. This is

[1] On page 2 of its original petition for assumption, LTD erroneously referred to 47 C.F.R. 51.301(c)(5). The correct citation should be 47 C.F.R. 51.301(c)(4).
[2] S.C. Code Ann. Section 58-9-10(13) (Supp. 1996).

particularly true if the intended services are as controversial and violently opposed by incumbents as the services LTD intend on offering.

The real problem the PSCSC has with arbitrating the differences between LTD and GTE is in expending its resources on what it considers to be "a potentially lengthy and expensive arbitration proceeding". Page 4 of PSCSC response. This reason for not conducting an arbitration proceeding is not found within the Act or the FCC Rules implementing the Act.

Section 252(a)(1), which LTD has consistently cited as its basis for declaring itself a telecommunications carrier eligible to arbitrate before state commissions, provides the basis for the initiation of voluntary negotiations between parties. It states:

> "Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the ***requesting telecommunications carrier***. . . ."

As this passage indicates, by virtue of presenting a request for interconnection, services or network elements to an incumbent LEC, the requesting party is then considered by the Act to be a requesting telecommunications carrier.

Additionally, LTD has already shown in its filings with the FCC, that, in the legislative history of the Act, the Conference Committee considered:

> "that the duties imposed under new section 251(b) make sense only in the context of a specific request ***from another telecommunications carrier or any other person*** who actually seeks to connect with or provide services using the LEC's network".

Therefore, for purposes of negotiation with an incumbent LEC, or for purposes of mediation or arbitration before State Commissions, requests from another telecommunications carrier or any other person are equivalent from a federal perspective. All references to a carrier, telecommunications carrier, or requesting telecommunications carrier in the Act must be interpreted with the understanding that any of these carrier designations encompasses any entity bringing a negotiation request to an incumbent LEC. Any other interpretation leads into endless chicken and the egg questions and Catch-22 scenarios regarding how a new entrant becomes a

telecommunications carrier. For purposes of creating competitive markets, these situations are unacceptable.

Other legal issues are raised by GTE. GTE argues on page 3 of its opposition that LTD should file for Federal district court review of the PSCSC decision under Section 252(e)(6) and that the FCC has no jurisdiction in this case. However, as a close reading of Section (252(e)(6) indicates, this avenue is for parties that have been aggrieved by a State Commission determination involving an actual interconnection agreement or a statement of generally available terms. LTD has no interconnection agreement that has been approved by the PSCSC to be aggrieved with, which is precisely the reason Section 252(e)(5) of the Act applies in this case.

GTE (on page 2 of its opposition) states that the South Carolina law that the PSCSC was applying was not contrary to the provisions of the 1996 Act. GTE conveniently ignores the previously cited FCC Rule, 47 C.F.R. 51.301(c)(4), which specifically requires incumbent LECs to negotiate with requesting telecommunications carriers prior to obtaining state certification. If a requesting telecommunications carrier is able to negotiate without state certification under FCC Rules, common sense and the intent of the Act dictate that a failed negotiation between parties should be arbitrated absence state certification.

The recent Eighth Circuit decision[3], in the first paragraph of its initial Background section introducing their opinion, first uses the term *competing companies, requesting new entrant*, and then *competing telecommunications carrier*, to describe the entities that are able to avail themselves to the local competition provisions of the Act. In this same paragraph, the Eighth Circuit goes on to say that:

> A company seeking to enter the local telephone service market may request an incumbent LEC to provide it with any one or any combination of these three services.

[3] LTD currently only has an electronic text version of the decision (Iowa Utilities Board v. FCC, __F.3d__, Nos.96-3321 et. al.) from the Eighth Circuit's Web site. Unfortunately, this version does not have page numbers. LTD will cite this order using paragraph descriptions and numbers.

In their opinion, the Eighth Circuit actually affirms that LTD has in fact followed the entry path provided in the Act by deciding to be a competing company, becoming a requesting new entrant, and then a competing telecommunications carrier

In the very next paragraph following, the Eighth Circuit decision states:

> If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. The final agreement, whether accomplished through negotiation or arbitration, ***must*** be approved by the state commission. (emphasis added)

As the above confirming court opinion shows, the PSCSC has failed in their duty to arbitrate open issues between GTE and LTD, a new entrant requesting telecommunications carrier entitled to arbitration before state commissions, and has therefore triggered Section 252(e)(5) of the Act. FCC assumption of LTD's arbitration is the only remedy available to LTD and should be initiated as soon as possible to the benefit of South Carolina telecommunications consumers.

Respectfully submitted,

Date: August 12, 1997

James M. Tennant

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served one copy of the foregoing EX PARTE COMMENTS OF LOW TECH DESIGNS, INC., by depositing same in the United States mail in a properly addressed envelope with adequate postage thereon to insure delivery to the following parties:

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An original and two copies were delivered, in the same manner, to:

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This 12th day of August, 1997.

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